UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

MILLENNIUM MAINTENANCE & ELECTRICAL CONTRACTING, INC. Employer	)	
and	)	Case No. 29-RC-11276
LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO Petitioner	)	
and	)	
LOCAL 363, UNITED SERVICE WORKERS, TRANSPORTATION COMMUNICATION UNION, AFL-CIO Intervenor	)	

REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION

Millennium Maintenance & Electrical Contracting, Inc. ("Employer"; "Millennium") is engaged in the electrical contracting industry. Local 3, International Brotherhood of Electrical Workers, AFL-CIO ("Petitioner") filed a petition with the National Labor Relations Board, herein called the Board, under Section 9(c) of the National Labor Relations Act, herein called the Act, seeking to represent a bargaining unit consisting of all full-time and regular part-time electricians, electrical maintenance

mechanics, helpers, apprentices, trainees and expediters employed by the Employer at its Brooklyn facility, but excluding all other employees, office clerical employees, managers, professional employees, guards and supervisors as defined in the Act.

The Employer is a member of the Building Industry Electrical Contractors Association ("Association"), which is party to a multiemployer Association-wide collective bargaining agreement, effective December 1, 2005, through November 30, 2008, with Local 363, United Service Workers, Transportation Communication Union, AFL-CIO ("Intervenor"; "Local 363"). Both the Intervenor and the Association intervened on the basis of this collective bargaining agreement, which encompasses the petitioned-for unit.

On December 19, 2005, a hearing was conducted before a Hearing Officer of the Board. On February 6, 2006, the undersigned issued a Decision and Direction of Election in the petitioned-for unit. On February 24 and 27, 2006, the Intervenor and the Employer filed Requests for Review, which were granted in part on April 5, 2006. On March 3, 2006, an election was conducted in the petitioned-for unit, and the ballots were impounded pending the Board's decision on the Requests for Review.

At the December 19, 2005, hearing, and in their briefs to the Regional Director, the Employer and the Intervenor contended that the Association-wide multiemployer collective bargaining agreement that is currently in effect, and that encompasses the petitioned-for bargaining unit, is a 9(a) agreement, operating as a contract bar. However, the Employer and the Intervenor refused to identify any of the other employer-members of the Association. In my February 6, 2006, decision, I concluded that the evidence was insufficient to establish that the Association-wide multiemployer agreement embraces an

appropriate multiemployer bargaining unit, or that Local 363 has 9(a) status with respect to this unit. Accordingly, I was unable to conclude that the Association-wide agreement, effective December 1, 2005, through November 30, 2008, operates as a bar.

However, in their Requests for Review, the Employer and the Intervenor introduced a new argument, which was not raised at the hearing or in the parties' post-hearing briefs to the Regional Director. Pursuant to this newly-raised argument, the Employer and the Intervenor contended that if the petition is not barred by the multiemployer Association-wide agreement that is currently in effect, then the petition is barred, in the alternative, by an individual agreement between Millennium and the Intervenor, that is also in effect. The Board's remand directs me to consider this new argument.

Timeliness

Initially, I note that the Employer and the Intervenor failed to raise this new issue in a timely fashion, as required by Section 102.67(d) of the Board's Rules and Regulations. Section 102.67(d) provides, inter alia: "(d)…But such request [for review] may not raise any issue or allege any facts not timely presented to the Regional Director." It bears repeating that at the hearing conducted herein, the Employer and the Intervenor contended that the current multiemployer Association contract with Local 363 constituted a bar to the instant petition. Neither at the hearing nor in their briefs to the Regional Director did either party urge that the individual contract between the Employer and Local 363 is a bar. Thus, the parties' belated attempt to establish that the individual contract has bar quality is untimely. Under Section 102.67(d), an argument not timely presented to the Regional Director, and raised for the first time in a Request for Review

to the Board, is waived. *Fred Meyer v. NLRB*, 860 F.2d 1088 (9th Cir. 1988). Moreover, the newly raised argument that the individual contract bars the petition contradicts the position taken by the Employer and the Intervenor at the hearing, and in their post-hearing briefs.

Clearly, due process was a major factor considered by the Board in promulgating Section 102.67(d). All parties should be apprised of the issues and be given a full and fair opportunity to make a complete record and address the legal issues in a post hearing submission. When an issue is raised for the first time in a Request for Review, both the opposing party and the Board are deprived of the right to fully confront the issue. Moreover, to permit this approach could potentially allow one party to forestall the conduct of an election indefinitely. A party could withhold litigating an issue at the pre-election hearing, and then raise the issue for the first time in a Request for Review before the Board, resulting, as here, in a remand to the Region for consideration and drafting of a supplemental decision. This conduct could be repeated and if permitted, could clearly frustrate employees' rights under Sections 7 and 9 of the Act to the prompt conduct of a representation election.

Inadequacy of the Individual Contract as a Bar

The individual contract now being asserted as a bar consists of a photocopy of a three-page Memorandum of Agreement, effective December 1, 2005, through November 30, 2008. It is defective as a bar for several reasons.

The Board's contract bar rules seek to achieve a "balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives." *Appalachian Shale Products Co*., 121 NLRB

1160 (1958). Accordingly, "[b]ecause a finding of contract bar necessarily results in the restriction of the employees' right to freely choose a bargaining representative, an agreement must meet certain formal and substantive requirements in order to bar an election." *Waste Management of Maryland, Inc*., 138 NLRB 1002 (2003)(citing *Appalachian Shale*, 121 NLRB at 1161). To bar a petition, a contract must be signed by both parties prior to the filing of the petition, and must contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship. *Waste Management*, 138 NLRB at 1002 (citing *Appalachian Shale*, *supra*). In addition, a contract, to serve as a bar, "must clearly by its terms encompass the employees sought in the petition." *Appalachian Shale*, 121 NLRB at 1164. Where prior ratification by the union membership is made "a condition precedent to contractual validity by express contractual provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition." *Appalachian Shale*, 121 NLRB at 1163.

In evaluating whether a contract has bar quality, "the Board has consistently limited its inquiry to the four corners of the document or documents alleged to bar an election and has excluded the consideration of extrinsic evidence." *Waste Management*, 138 NLRB at 1002. Thus, when faced with a dispute regarding the termination date of a contract urged as a bar, the Board emphasized that "to rely on parol evidence outside the contract to vary the clear termination date established in the contract itself would be to destroy those objects of stability and predictability which our contract bar policies have long sought to achieve." *Union Fish Company*, 156 NLRB 187, 192 (1965). With regard to a union-security provision alleged to be unlawful, the Board observed that it had "consistently held that the legality of a contract asserted as a bar is to be determined in

representation proceedings from the face of the contract itself and that extrinsic evidence will not be admitted in a representation proceeding to establish the unlawful nature of such a contract." *Jet-Pak Corporation*, 231 NLRB 552 (1977). Similarly, "a condition of prior ratification must be expressed in the written instrument itself and cannot be established by parole or other extrinsic evidence." *Merico, Inc.*, 207 NLRB 101 n. 2 (1973). In the unfair labor practice context, "Board precedent prohibits the use of parol evidence to vary the unambiguous terms of a collective-bargaining agreement." *Quality Building Contractors, Inc.*, 342 NLRB No. 38, slip op. at 2 (2004).

In the instant case, there is nothing on the face of the individual contract relied on by the Employer and the Intervenor that identifies Millennium as a party to the contract, bound by its terms, or as an employer whose employees are covered by the terms of the contract. Rather, the Memorandum of Agreement states, at the top of the agreement, that it is between "the Union" and "the Employer." The signature portion identifies "the Union" as "United Service Workers, Local 363, IUJAT," and identifies "the Employer" as "Building Industry Electrical Contractors Association." Although the contract was signed by the president of the Intervenor, and by the president of the Association, it was not signed by the president, or any officer, of Millennium. Only by relying on parol evidence would it be possible to conclude that the Association signed the agreement on behalf of Millennium, or as an agent for Millennium, or that the agreement encompasses the employees of Millennium.

Therefore, the evidence fails to establish that the individual agreement "clearly by its terms encompass[es] the employees sought in the petition," *Appalachian Shale*, 121 NLRB at 1164, or that the individual agreement was signed by Millennium. *Appalachian*

Shale, 121 NLRB at 1161-62; *Waste Management*, 138 NLRB at 1002. Accordingly, under the standards established by many decades of Board precedent, the individual contract between Millennium and the Intervenor does not bar the petition herein. Clearly, a collective bargaining agreement that does not reveal the name of the employer does not satisfy the Board's policy of promoting stability in labor relations, as the employees would have no way of knowing, from the face of the contract, that it governs their day-to-day rights and obligations.

In addition, as noted above, *Appalachian Shale* provides that where prior ratification by the union membership is made "a condition precedent to contractual validity by express contractual provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition." *Appalachian Shale*, 121 NLRB at 1163. The individual contract now being relied on as a bar contains the following express contractual provision: "4. This agreement is subject to ratification by the members of the union in the bargaining unit." The Intervenor's president specifically testified that no separate ratification vote was conducted among the employees of Millennium. Rather, he testified that the contract ratification vote was conducted on an Association-wide basis, for the Association-wide contract. Therefore, since the individual contract now being asserted as a bar contains an express prior ratification requirement, and no prior ratification vote took place among the employees of Millennium, the individual contract can not serve as a bar. *Appalachian Shale*, 121 NLRB at 1163.

Finally, the record testimony indicates that the contract currently in effect is the contract between the Intervenor and the Association, and not the individual contract between the Intervenor and Millennium, now being asserted as a bar. Although the

Employer and the Intervenor assert that both of these contracts are in effect, the two contracts cover two different bargaining units: (1) the multiemployer Association-wide unit, and (2) the Employer unit. I am unaware of any Board support for a finding that the employees of one employer can be in two bargaining units, simultaneously. In the instant case, it appears that the failure to establish that the Association-wide agreement has bar quality motivated the Employer and the Intervenor to argue for the first time, in their Requests for Review, that a different contract, covering a different unit, should bar the instant petition. As the record clearly establishes that the Employer is a member of the Association, and its employees a component of the multiemployer unit, a position advocated vociferously by both the Employer and the Intervenor, I find that the individual contract limited to a single employer unit does not bar the instant petition.

Accordingly, I shall direct that the ballots impounded at the election on March 3, 2006, be opened and counted, and that a tally of ballots issue.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **May 8, 2006.** The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: April 24, 2006, Brooklyn, New York.

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Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201